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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 823

VICTOR H. FALL, one of the Presiding Judges of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, and BRUCE W. SANBORN,

Petitioners,

vs.

ALEXANDER B. JOHNSTONE,

Respondent.

Brief in Opposition

TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

The respondent, above named, opposes and resists the granting of Writ of Ceritorari herein and does hereby respectfully submit his Brief in Opposition to the Petition on file herein.

JURISDICTION

The petition on file herein states that the jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1257, Subdivision 3. (Pet. page 2).

Respondent disputes that the jurisdiction of the Court has been so invoked. This by reason of deficiency of any proper party petitioner.

PARTIES

HON. VICTOR H. FALL NOT A PROPER PETITIONER

The petitioner named as "Victor H. Fall; one of the Presiding Judges of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis & Clark" in so petitioning this Court was acting *ultra vires*.

On the 16th day of February, 1958, an affidavit of disqualification was filed in Cause No. 16386 in the said District Court. This was the original quiet title action outlined on page 6 hereof. Certified copies of this disqualifiying affidavit have been filed with this Honorable Court. The same is set forth in full in Appendix hereto, page 5. The legal effect of filing of this affidavit was to render Judge Fall "without authority to act further in any action, motion, or proceeding" except for setting of

trial calendars or transferring the cause to another court or judge. Sec. 93-901, Revised Codes of Montana, 1947. (Appendix, page 1).

Not only was Judge Fall disqualified and without authority to act in the said Cause No. 16386, but also in all matters connected therewith. *Stefonick v. District Court*, 117 Mont. 86, 157 Pac. (2d) 96.

Victor H. Fall, as District Judge therefor had no authority to petition this Court for ceritorari. His execution thereof was void as being *ultra vires.*

Further, Judge Fall, by reason of his disqualification, is not a proper party petitioner herein. Having been so disqualified from acting and not presiding in said Cause No. 16386, the Writ of the Supreme Court of Montana had no effect as to him. He could not act on the matter, as a matter of jurisdiction, whether or not the said Writ issued. If a party to a suit is in no manner affected by what is decreed, he cannot be said to be a party to the decree and, therefore, is not a proper petitioner for review of the decree. *Farmers Loan and T. Co., v. Watermen*, 160 U. S. 265, 1 S. Ct. 131, 27 L. Ed. 115.

As shown by the decision of the Montana Supreme Court (Pet. p. 1), and the Order issued pursuant thereto, (Pet. p. 19), the presiding Judge in said Cause No. 16386 was the Hon. Lester Loble, who is *not* a petitioner herein.

BRUCE W. SANBORN NOT A PROPER PARTY PETITIONER

The petition herein states that "Sanborn here having the right to intervene is properly a petitioner in this proceeding." (Pet. p. 5-6). There is then cited in support of that proposition the case of *U. S. v. Terminal R. Association,* 236 U. S. 194, 199.

The petitioner's statement is without merit. His citation is inapplicable. The *Terminal* case was an appeal in which the jurisdiction of the Court was *invoked* by proper parties and *after* such invoking of jurisdiction a petition to *intervene* was granted. Respondent here does not agree that the right to intervene necessarily confers the right to initiate the proceedings. Obviously the *Terminal* case does not so hold.

AWrit of Ceritorari will not be granted on application of one not a party to the record. Re *Leaf Tobacco Board of Trade,* 222 U. S. 32 S. Ct. 833, 56 L. Ed. 323.

It should be noted that Sanborn, is here attempting to initiate proceedings which can only be initiated by a party below. He is complaining that he *was not* a party below, Surely, under the applicable law, it promotes rather than defies logic to state that if Sanborn was *not* a party below he cannot herein petition for the Writ: if he *was* a party below, his petition is without merit: in either case, the Writ should be denied.

QUESTIONS PRESENTED

This Respondent does not believe that the questions presented are clearly, accurately or fully stated. The Respondent respectfully urges that the questions presented are as follows:

1. Whether a Supreme Court of a State takes a person's real property and thereby violates the Constitutional requirement of due process of law by entering a decree ordering a lower Court to dismiss a quiet title action as to that property, on the ground that the plaintiff in such action is guilty of laches having failed to diligently prosecute said action where such decree is made and entered in special proceedings to which the said plaintiff was not made a party *but where the counsel for the plaintiff appeared, argued and participated on plaintiff's behalf* in accordance with the established practice and procedure of the State's Judicial system.

2. Whether the Supreme Court of a State violates the Constitutional requirements of due process of law by not hearing evidence on alleged issues of fact which alleged issues of fact have no bearing on the question of laches upon which question the said State Supreme Court ultimately decided the cause.

STATEMENT

While much of the material set forth in Petitioners' "Statement" is accurate, much of it is not. The Statement, furthermore, is misleading and not complete. Far from

being factual, the statement contains legal conclusions which Respondent denies and opposes. The Respondent, therefore, respectfully re-states this statement of this cause:

The petitioner Sanborn on the 23rd day of December, 1936, instituted and filed action No. 16386 in the District Court of the First Judicial District of the State of Montana to quiet title to real property, naming Johnstone as a party defendant and seeking to set aside a tax deed to Johnstone. The attorney appearing for Sanborn was Charles Davidson. This action was tried and a judgment rendered in the lower Court quieting the title in Johnstone, respondent herein.

An appeal was perfected to the Supreme Court of Montana and the judgment reversed, 113 Mont. 1, 120 Pac. (2d) 567. The Supreme Court of Montana required that the deposit in the sum of $1,213.41 to reimburse taxes paid, be delivered to Johnstone and made no further order. The remittitur in that case was filed on April 17, 1942. Thereafter, on the 23rd day of May, 1944, the then Judge of the District Court of the First Judicial District of Montana, after filing of the remittitur and, (it is granted) without any notice to the petitioner Sanborn, proceeded to enter an order on the application of the respondent herein requiring the petitioner Sanborn to deposit $2,041.29 as payment for additional taxes which had been paid by Johnstone pending Cause No. 16386, according to the County Tax records and gave the petitioner Sanborn the right to deposit such amount on or before June 20, 1944,

otherwise a judgment would be entered quieting the title to the lands and premises in Johnstone, respondent herein.

This order of May 23, 1944, was made under the provisions of Section 2214 the Revised Codes of Montana, 1935 (now R.C.M. 1947, §83-4158,) (Appendix, page 2).

That thereafter on June 8, 1944, the petitioner Sanborn filed in said District Court a petition to vacate the order for a deposit of the additional funds in the sum of $2,041.29.

No further proceedings were then had for approximately 10 years.

The respondent Johnstone, on November 23, 1954, filed a motion to dismiss the action on grounds of laches, the case then being 18 years old.

No further proceedings were had in the District Court of Lewis and Clark County until an amended petition was filed January 11, 1957, by Sanborn, seeking the vacation of the order for an additional deposit.

All of said motions and petitions came on for hearing before Judge Fall who, on the 11th day of January, 1957, set aside the order of the District Court made on the 25th day of May, 1944, as being without jurisdiction, and overruled the Motion to Dismiss. There appeared on behalf of petitioner Sanlborn, attorney Charles N. Davidson, Ralph J. Anderson and Stanley P. Sorenson.

Judge Fall was thereafter, on the 15th day of February

1957, disqualified by affidavit (Appendix 5) from proceeding further in the cause, under R.C.M. 1947 §93-901 (Appendix 1).

The respondent here, Johnstone on March 2, 1957, filed a petition with the Supreme Court of the State of Montana, seeking an appropriate writ to annul the orders made by the District Court on January 11, 1957, and to prohibit said Court from further proceeding in District Court Cause No. 16386 except to enter judgment quieting title in favor of Johnstone or to dismiss the action. In accordance with the established and customary procedure of Montana's Judicial System, an appearance on behalf of the respondent Court, was made and entered by Messrs. Davidson, Anderson and Sorenson as attorneys for Sanborn, the interested party.

Thereupon the cause was heard by the State Supreme Court on March 20, 1957.

No evidence was received in these proceedings in the Supreme Court of the State of Montana, that Court ruling that no material questions of fact had been presented and that the legal questions were solvable on the record as made and on the uncontroverted facts (see Pet. Appendix, p. 3).

On the 24th day of June, 1957, the Supreme Court of the State of Montana first announced its decision in favor of this Respondent (Petitioner below).

Petition for re-hearing was then filed on the 2nd day

of July, 1957. This is the petition which is set forth on page 12 of the appendix of the petition herein.

This Petition for re-hearing by the Montana Supreme Court was *granted* and the cause was re-heard on the 10th day of September, 1957.

The final decision was then announced, on November 17, 1957, as set forth in the Petition herein (appendix, p. 1).

Petition for Re-hearing was then filed in November, 1957, and this petition was the one denied by the State Supreme Court as shown on page 13, appendix, of the Petition herein.

ARGUMENT

This Petition for Writ of Ceritorari should be dismissed upon the following grounds and for the following reasons:

1. The jurisdiction of the Supreme Court of the United States has not been invoked by reason of lack of proper parties petitioner as heretofore pointed out.

2. There are no proper parties petitioner before the Court.

3. The Petition has not been prepared in accordance with the rules of this Court, and especially Rule 23, Rev. Rules of the Supreme Court of the United States, Title 28 U. S. C. A p. 15, 1957, pocket part, in that:

(a) Neither the Montana Statutes nor the article of the Montana Constitution referred on pages 2 and 5 of the Petition are set forth verbatim, as required by the rules:

(b) The Petition is misleading, ambiguous and inaccurate throughout, and fails to present petitioners case with accuracy and clearness as required by Rule 23 (4).

3. The matter which the petitioners want this Court to review was decided correctly by the Supreme Court of the State of Montana, in the administration of the judicial system of the State of Montana. The question was presented to that Court for the first time on a Petition for Re-hearing and that Court then promulgated a new decision saying:

"It is contended by counsel for respondents that the result of this opinion is to take from Sanborn his property without due process of law since he is not a party to this proceeding, and has had no notice or opportunity to be heard. There is no merit in this contention. He was the party who sought and obtained the orders in respondent court that were brought here for review in this proceeding. His counsel in those proceedings are here endeavoring to uphold the action of respondent court.

* * * Due process in the appellate courts may consist of any proceeding in keeping with the general and established principles of judicial procedure." 16 C.J.S., Constitutional Law, §626, pp. 844, 847.

"Our reports are replete with cases showing that the established procedure for special proceedings de-

signed to review orders or judgments of the district courts is for the court to be named as defendant or respondent, and for counsel representing the party interested in upholding the order or judgment of the court to appear for the court though actually representing his client, the party interested in upholding the court's order or judgment.

The situation is comparable to cases involving appeals from orders or judgments. Notices of appeal and of subsequent proceedings go to the counsel and not to the parties.

Our research has disclosed but one case where this same contention was made in a proceeding where the court and not the party interested was named as defendant or respondent, and it reached the same conclusion which we have." *Morse v. District Court*, 65 Nev. 275, 195 Pac. (2d) 199 (Pet. p. 9, 10).

4. The petitioner Sanborn is pursuing the wrong remedy. The petition herein shows on its face that *there was no taking* of property by the Montana Supreme Court Decision. There was only a dismissal of an action. In so far as it appears from the Petition, the Petitioner can commence a new proceeding in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, it being the county wherein the lands are situated. There is nothing to indicate, in the Petition on file herein, that the petitioner in any way was deprived of his property or any claim to property, by reason of the decision of the Supreme Court of the State of Montana.

5. It appears on the face of the Petition that either one of two situations existed in the proceedings in the Supreme Court in the State of Montana. Either Mr. Sanborn *did* appear by counsel, in the proceedings in that Supreme Court; or, the question of due process was not properly raised in the proceedings below. Either situation is fatal to the relief he petitions for here. For, if Mr. Sanborn was not participating in the Montana Supreme Court proceedings, *who can be said to have raised the question of due process, as stated in the Petition for Re-hearing?* (Pet. Appendix, page 12). Even if some property had been taken by virtue of the Montana Supreme Court proceedings, surely the respondent District Court and the Respondent District Judges, had no cause to complain that they were denied due process. The truth of the matter, as exemplified by the face of Petitioner's brief herein, is that Petitioner Sanborn was very much active, through counsel, in arguing and presenting *his* position before the Supreme Court of the State of Montana, and that to state before this Supreme Court of the United States, at this time, that Sanborn did not appear and participate in those proceedings, borders upon the frivolous, the frivolity appearing from the petition herein.

PETITIONERS' AUTHORITIES

The following cases have been cited by the Petitioners, and each involved an "in personam" action and not an "in rem" action, which was the basis of the proceedings here. They are further distinguishable as noted below:

In *Clark v. Wells*, 203 U. S. 138, Wells sued Clark on a note in Helena, Montana. No service was had, as the defendant was in California. Wells attached some land of Clark, and Clark appeared specially saving the right to object to the jurisdiction of the District Court, and only for the purpose of removing the case to the Fderal Court. The case was removed to Federal Court and thereafter service was attempted by publication. Clark again appeared specially challenging the jurisdiction of the court to render a judgment in personam. The Federal Court rendered a judgment for the plaintiff against Clark personally and said the judgment was collectible from the lands attached. The Supreme Court of the United States ruled that the personal judgment was ineffectual *but that the judgment as to the property involved was valid.* This court then used the following most interesting and applicable language:

> "The defendant it is true had not been personally served with process or submitted his person to the jurisdiction of either the State or Federal Court. But he did not attack the validity of the attack proceedings which appear to be regular and in conformity to the law of the State. There was no necessity of publication of notice in the Federal Court in order to warn the defendant of the proceeding; he knew of it and to a qualified extent appeared in it."

The case clearly supports Respondent's contention here, not the Petitioners'.

In Baltimore & Ohio Ry. Co. v. United States, 298 U. S. 349 80 L. Ed. 1213, the matter involved was an appeal from an order of the U. S. District Court dismissing a suit to set aside an order of the Interstate Commerce Commission relating to the division among participating carriers of rates on Florida citrus fruits. The action does not even remotely resemble the case at bar.

In the *Baltimore & Ohio* case, supra, the Supreme Court ruled that where a party invokes the just compensation clause of the Constitution, he is entitled to judicial determination of the amount due him, including the right to introduce evidence as to just compensation. But the case is not applicable here. Here, the Montana Supreme Court determined the issue of whether a cause should be dismissed on grounds of laches and determined that issue on the pleadings. As pointed out by that Court, there were no facts asserted that tended in any way to furnish the excuse for the delay. On the point of laches, no issue was ever made by the pleadings. Hence the taking of evidence was not required. *Risking repetition, the subject decision of the Montana Supreme Court took no property from Petitioner here. It dismissed his cause because he failed to diligently prosecute it.* The *Baltimore & Ohio* case, supra, is therefore, inapplicable.

In *Mullane v. Central Hanover, etc.,* 339 U. S. 306, 94 L. Ed. 865, the Supreme Court considered the question of whether the State Statute providing for notice to trus-

tees whose interests and addresses were unknown, violated the due process clause.

But, in the *Mullane* case, there was *not* involved, as here, a situation where a party, now claiming lack of due process *had appeared, argued* and contested the relief sought through counsel; his actual appearance being as practicable and efficient as in any cause at law, though he was not formally named in the proceedings. The *Mullane* case is not in point.

In *Covey v. Town of Sommers,* 351 U. S. 141, the town foreclosed a mortgage against real property of an incompetent woman. The United States Supreme Court held that statutory notice given to an incompetent denied due process when the town knew that the woman was incompetent. The case has not the remotest bearing on the issues presented by the petition here.

CONCLUSION

It is respectfully submitted that the petition for Writ of Certiorari, heretofore filed herein, should be denied.

Respectfully submitted,

FLOYD O. SMALL,
CLAYTON O. HERRON,
Galen Block
Helena, Montana
of Counsel

MYLES J. THOMAS,
Power Block,
Helena, Montana

APPENDIX

MONTANA STATUTES CITED BY RESPONDENT

The Revised Codes of Montana, 1947

Section 93-901 provides in pertinent part as follows:

"When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. Such affidavit may be made by any party to an action, motion, or proceeding, personally, or by his attorney or agent, and shall be filed with the clerk of the district court in which the same may be pending at least five days before the day appointed or fixed for the hearing or trial of any such action, motion, or proceeding (providing such party shall have had notice of the hearing of such action, motion, or proceeding for at least the period of five days and in case he shall not have had notice for such length of time, he shall file such affidavit immediately upon receiving such notice). Upon the filing of the affidavit, the judge as to whom said disqualification is averred shall be without authority to act further in the action, motion or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the action or proceeding to some other court, nor to the power of calling in another district judge to sit and act in such action or proceeding, providing that no judge shall so arrange the calendar as to defeat the purposes of this section."

Section 83-4158 provides in pertinent part as follows:

"In any action now pending, or hereafter brought to set aside or annul any tax deed, or to quiet title, or to determine the rights of such purchaser, including the county, or his successors, to real property claimed to have been acquired by reason of tax proceedings or a tax sale, the purchaser or his successor upon filing an affidavit may obtain from the court an order directed to the person claiming to own the property, or to have any interest in or lien upon said property, or a right to redeem the same, or claiming rights hostile to the tax title (which said person is herein for convenince, called the true owner), commanding him to deposit in court, to the use of the tax purchaser or his successors, the amount of off taxes, interest and penalties which would have accrued if said property had been regularly and legally assessed and taxed as the property of said true owner and sold for delinquent taxes and was about to be redeemed by him, and the amount of all sums reasonably paid thereafter by said purchaser or his successors after three (3) years from the date of said tax sale in preserving said property or in making improvements thereon while in possession thereof, as the total amount of said taxes, interest, penalties and improvements is alleged by the plaintiff and shall appear in said order, or to show cause on a date to be fixed in said order, not exceeding thirty (30) days from the date thereof, why such payments should not be made. Said affidavit shall set forth the place of residence of said true owners and whether they are in the State of Montana, if known to the plaintiff, or that the same is not known to the plaintiff

. . . . If such amount, when so determined, shall not be paid within the time fixed by said court, then said true owner shall be deemed to have waived any defects in the tax proceedings and any right of redemption, and thereupon, irrespective of any irregularities, defects or omissions or total failure to observe any of the provisions of the statutes of Montana regarding the assessment, levying of taxes, or sale of property for taxes, and the giving of notices, including notices of redemption, or concerning tax deeds, whether or not such omissions or failures make said proceedings void (other than that the taxes were not delinquent or have been paid), the title of such true owner shall not be quiet as against said purchaser or his successors, and a decree shall be entered in said action quieting the title of said purchaser or his successor as against said true owner.

. . . . *In the final judgment the court shall also determine the rights growing out of any additional taxes on said property accruing or being paid by either party during the pendency of said suit, and, in said suit, the court shall have complete jurisdiction to fix the amount of taxes which should have been paid and to determine all questions necessary in granting full relief, including the power, in appropriate cases to order any assessor or other tax officer to make and certify to the court a corrected or new assessment or to do any other act or thing necessary to enable the court to do complete justice in the premises. Errors may be reviewed on appeal from the final judgment.*" (Emphasis supplied).

MONTANA STATUTES CITED BY PETITIONERS

The following are the sections of the Revised Codes of the State of Montana, cited by Petitioners, (Pet. page 5) but which Petitioners failed to set forth in accordance with the Rules:

Section 93-9106 states in pertinent part as follows:

> "The adverse party may answer under oath. On the return of the alternative Writ of Prohibition or Mandate, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action."

Section 93-9107 states in pertinent part as follows:

> "If an answer be made, ***which raises a question as to a matter of fact essential to the determination of the motion,*** and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court or judge may, ***in its or his discretion,*** order the question to be tried before a jury, and postpone the argument until such trial can be had. The question to be tried must be distinctly stated in the order for trial." (Emphasis supplied).

Section 93-9202 states in pertinent part as follows:

> ***"Where and when issued.*** The same Writ of Prohibition may be issued by the supreme court or the district court, or any district judge, to any inferior

tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested."

AFFIDAVIT OF DISQUALIFICATION

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

BRUCE W. SANBORN,
Plaintiff,

vs.

LEWIS & CLARK COUNTY, a body politic and corporate; ALEXANDER B. JOHNSTONE, and _____ JOHNSTONE, his wife, otherwise known as Mrs. ALEXANDER B. JOHNSTONE,
Defendants.

No. 16386
AFFIDAVIT OF DISQUALIFICATION

COUNTY OF LEWIS & CLARK } ss.
STATE OF MONTANA }

CLAYTON R. HERRON, being first duly sworn on oath deposes and says:

That he is an attorney for the above named defendant, Alexander B. Johnstone, and as such attorney makes this affidavit for and on behalf of said defendant; that affiant has reason to believe and does believe that said defendant cannot have a fair and impartial hearing or trial before

the Honorable Victor H. Fall, District Judge of the First Judicial District of the State of Montana, who is the presiding Judge in this cause, by reason of the bias and prejudice of said Judge Victor H. Fall, in said matter; and that affiant, as attorney for said defendant, Alexander B. Johnstone, now therefore makes and presents and files this affidavit for the purpose of disqualifying the said Judge Victor H. Fall, from acting or presiding in this case.

Dated this 15th day of February, 1957.

CLAYTON R. HERRON,

Subscribed and sworn to before me this 15th day of February, 1957.

FLOYD O. SMALL,
Notary Public for the State of Montana.
Residing at Helena, Montana. My commission expires Jan. 6, 1958.

(SEAL)